

The Appeals Board adopts the stipulations enumerated in the Award of the Special Administrative Law Judge dated February 4, 1994.

ISSUES

Claimant alleges that he developed bilateral carpal tunnel syndrome during the period of May or June 1990, through February 1991. The Special Administrative Law Judge found claimant was entitled permanent partial general disability benefits based upon a fifty-five percent (55%) work disability. The respondent and insurance carrier requested this review by the Appeals Board to address the issue of nature and extent of disability, if any. That is the sole issue before the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds, as follows:

The Award of the Special Administrative Law Judge should be modified to reflect that claimant is awarded permanent partial general disability benefits based upon a thirty-one percent (31%) work disability for the period that he worked prior to his lay off on June 15, 1992, and afterwards based upon a work disability of fifty-nine and one-half percent (59.5%).

Claimant's allegations that he sustained personal injury by accident resulting in bilateral carpal tunnel syndrome by a series of mini-trauma during the period of May 1990 through February 1991, are supported by the entire record. For purposes of computing the award, the date of accident of February 1, 1991, will be used.

At time of the regular hearing, claimant was 27-years old, a high school graduate, and had completed one year of college studies. Claimant worked for respondent, the Boeing Company, as a sheetmetal mechanic. Part of claimant's treatment for his bilateral carpal tunnel syndrome condition was surgical release. After recovery from surgery, claimant was returned to work by respondent and placed in the Work Pool. Claimant remained in the Work Pool from November 1991 until his layoff on approximately June 15, 1992. The Appeals Board adopts the finding of the Special Administrative Law Judge that claimant's average weekly wage for the period of February 1, 1991, through June 15, 1992, is \$520.80, and excludes additional compensation items as they continued to be paid during that period. The Appeals Board also adopts the finding of the Special Administrative Law Judge that claimant's average weekly wage for the period commencing June 16, 1992, is \$673.07, as that is the approximate date of claimant's layoff and the date of discontinuance of the additional compensation items.

Claimant was evaluated by labor market experts Jerry D. Hardin and Karen Crist Terrill to obtain their opinions regarding claimant's loss of ability to return to the open labor market and earn a comparable wage as a result of his work related injuries. Assuming the restrictions and limitations imposed upon claimant by the only physician to testify, Ernest R. Schlachter, M.D., Mr. Hardin believes claimant has lost seventy to eighty percent (70-80%) of his ability to perform work in the open labor market, whereas Ms. Terrill believes that claimant has lost forty-five to fifty-five (45-55%) of that ability. Also utilizing Dr. Schlachter's restrictions, Mr. Hardin believes that claimant has lost approximately sixty-one percent (61%) of his ability to earn a comparable wage, whereas Ms. Terrill believes claimant has lost approximately fifty percent (50%) if he lacked management experience.

Mr. Hardin believes that claimant is now capable of earning approximately \$240.00 per week, assuming that he does not violate the restrictions set forth by Dr. Schlachter. Ms. Terrill also testified that claimant would have no loss of ability to earn a comparable wage in the event claimant possessed sufficient restaurant management and supervisory skills and experience.

The Appeals Board finds that claimant lacks the necessary restaurant management experience to qualify him for the managerial positions envisioned by Ms. Terrill. Claimant worked as a night manager of his mother's coffee shop on a part-time basis for approximately five years earning \$5.00 per hour. As night manager, claimant cooked, cleaned, and cashiered. Claimant's only duty that two other night workers did not have was putting the money away at the end of the shift. Claimant exercised only limited supervisory authority over his co-workers, one of whom was his sister. Claimant did not order supplies, nor did he schedule employees to work. Based upon this finding, the Appeals Board finds that Ms. Terrill's estimate that claimant has lost approximately fifty percent (50%) of his ability to earn a comparable wage is more credible than her opinion that claimant can earn a comparable wage as a restaurant manager.

Claimant is entitled to permanent partial general disability benefits based upon a thirty-one percent (31%) work disability for those weeks prior to June 15, 1992, and based upon an average weekly wage of \$520.80. Based upon the findings above, the Appeals Board finds that claimant's loss of ability to perform work in the open labor market lies somewhere between the labor market experts' opinions of forty-nine and seventy-five percent (49-75%). The Appeals Board finds that the loss of claimant's ability to perform work in the open labor market is sixty-two percent (62%). Regarding loss of ability to earn a comparable wage, the Appeals Board finds that there is no loss during the period in question as claimant was returned to work by respondent at a comparable wage and placed in the Work Pool. Although the evidence indicates that claimant sat at a table and did practically nothing, he did draw comparable wages for that activity. As there appears to be no compelling reason to give one factor of loss greater weight than the other, the Appeals Board finds that the factors should be averaged from which is derived the thirty-one percent (31%) work disability.

For the period commencing June 16, 1992, claimant is entitled to permanent partial general disability benefits based upon a fifty-nine and one-half percent (59.5%) work disability. This figure is derived by averaging the sixty-two percent (62%) loss of ability to perform work in the open labor market with the Appeals Boards' finding that claimant has lost fifty-seven percent (57%) of his ability to earn a comparable wage for the period in question. The fifty-seven percent (57%) loss of ability to earn comparable wage is derived by averaging the fifty percent (50%) figure provided by Ms. Terrill and sixty-four percent (64%). The sixty-four percent (64%) figure is computed by comparing the \$240.00 per week figure that Mr. Hardin believes that claimant may now earn with the pre-injury average weekly wage of \$673.07 (which includes additional compensation items). Giving both factors equal weight, we derive work disability of fifty-nine and one-half percent (59.5%). The Appeals Board is not required to weigh equally loss of access to the open labor market and loss of ability to earn a comparable wage. See Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 52-53, 816 P.2d 409, rev. denied 250 Kan. 806 (1991). Again, there appears no compelling reason to give either factor a greater weight and accordingly are weighed equally.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey dated February 4, 1994, is modified as follows:

The claimant is entitled to 15 weeks temporary total disability at the rate of \$278.00 per week or \$4,170.00 followed by 56.57 weeks at \$107.64 per week or \$6,089.19 through June 15, 1992, based on the average weekly wage of \$520.80 for a thirty-one percent (31%) permanent partial general body disability, and entitled to 336.11 weeks of compensation at the rate of \$267.00 in the sum of \$89,740.81 based on an average weekly wage of \$673.07 for a fifty-nine and one-half percent (59.5%) permanent partial general body disability making a total award of \$100,000.00.

As of February 4, 1994, there would be due and owing to the claimant 15 weeks temporary total compensation at \$278.00 per week in the sum \$4,170.00 plus 56.57 weeks permanent partial compensation at \$107.64 per week in the sum of \$6,089.19, and 85.57 weeks of permanent partial compensation at the rate of \$267.00 per week in the sum of \$22,847.19, for a total due and owing of \$33,106.38 which is ordered paid in one lump sum less amount previously paid. Thereafter, the remaining balance in the amount of \$66,893.62 shall be paid at \$267.00 per week for 250.54 weeks until the total sum of \$100,000.00 is paid or until further order of the Director.

The remaining orders of the Special Administrative Law Judge William F. Morrissey in the Award dated February 4, 1994, are affirmed and adopted by the Appeals Board as if specifically set forth herein.

IT IS SO ORDERED.

Dated this ____ day of July, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I disagree with one aspect of the majority opinion. The majority opinion finds that claimant has a thirty-one percent (31%) work disability for the period he was working after

his injury in the Work Pool at a wage comparable to his pre-injury wage. The majority then finds that the disability increased to fifty-nine and one-half percent (59.5%) once he was laid off. The change is explained by the wage loss factor in the work disability formula. Wage loss is considered to be zero while he worked at the comparable wage. The opinions of the experts are used to find a loss in wage earning ability after the layoff.

I believe there should be only one finding as to the percentage of disability and disagree with the majority's approach for two reasons. First, the determination to be made in finding work disability should relate to claimant's lost ability to earn wages, not actual wage loss. Actual post-injury wage can be a factor indicative of loss of ability, but should not automatically determine the loss. Slack v. Thies Development Corp., 11 Kan. App. 2d 204, 718 P.2d 310 (1986). The record contains no evidence that the claimant's abilities have changed to justify a change in the work disability. Second, the unavoidable result of the approach followed by the majority would call for review and modification every time the claimant's wages change. I do not think this approach was intended by our statutes. See Giles v. Associated Co., 223 Kan. 739, 576 P.2d 663 (1978).

Finally, I note that the approach followed here is similar to that followed in Lee v. Boeing Military Airplanes, Docket No. 157,744 (April 1994). In the Lee case, however, the Appeals Board found that the presumption against work disability applied so long as the claimant was working at a comparable wage. The claimant was, therefore, limited to functional impairment until the layoff and then the award increased to the higher work disability after the layoff. That change in the disability rating based on the presumption from work at a comparable wage may be justified as the converse of the authority found in K.S.A. 44-528(b). K.S.A. 44-528(b) authorizes cancellation or reduction of the award if the employee returns to work at a comparable wage. See Redgate v. City of Wichita, 17 Kan. App. 2d 253, 836 P.2d 1205 (1992). I believe, however, that the rationale followed in the Lee decision should be strictly limited to application of the presumption and not otherwise expanded.

Board Member

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